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INSTITUTE OF CIVIL LAW LIABILITY IN DOMESTIC AND FOREIGN CIVILISTIC DOCTRINE

Abstract. *The current stage of development of society is characterized by the rapid dynamics of information relations, the consolidation of interconnections between different phenomena, significant conflicts of conceptual nature, caused by the process of globalization. Such a starting point for cognitive activity is relevant for studying of such a fundamental legal category as legal liability. In their turn, a systematic understanding of the issue of civil liability involves not only taking into account the retrospective and tendencies of the civilistic doctrine in conditions of legal systems integration, but also the context of the progressive aspirations of the society expressed by the idea of civil society.*

The purpose of the article is to identify the status and prospects of the development of civil law liability within the framework of scientific studying and law-making searches, which are conducted in the latest comparative legal plane.

Attention is paid to the social and instrumental aspects of the nature of the category of responsibility. The importance of carrying out a comprehensive and systematic analysis of the legal phenomenon and the main methodological problems of civil liability, including its general philosophical aspects, is emphasized. The basic doctrinal approaches to solving the problem of justification of the conditions (grounds) of civil liability are considered. The doctrine of the composition of a civil offense as a basis of civil liability is supported. Absence of basic scientific researches of the bases of bringing to civil liability and releasing from it, separate conditions of responsibility, category “irresistible force”, incomplete research in the private legal doctrine of the problem of correlation of such categories as “civil liability”, “protection of civil rights”, “subjective civil rights abusing” is mentioned. The importance of the practical component of civil liability – its effectiveness as an element of the mechanism of legal regulation is emphasized.

The nature of qualitative changes in the substantive content of legal responsibility in the conditions of legal state and civil society formation is revealed. In this regard, it is concluded that the understanding of positive responsibility and the civil liability of its

preventive and educational function are connected. In the context of the issue of updating the civil legislation of Ukraine, the potential effectiveness of some DCFR articles, which are of general importance for the regulation of the institution of civil liability, was noted. At the same time, the high level of detail of some provisions of the DCFR, the emphasis on “legal technology” and fragmentation are recognized as features of the legal ideology of the DCFR.

Key words: *legal responsibility, civil law liability, globalization, civil society, positive liability, civil offense composition, DCFR.*

Extremely rapid development of modern society determines its dynamics, and at the same time it is characterized by the presence of internal contradictions.

The globalization processes and the formation of the principles of the information society cause the emergence of new trends in social development: a significant segment of problems loses its “national” character and transforms into global problems, which are, if not “planetary”, then at least become ethnic or national. This, of course, leads to their need for comprehensive and systematic research and joint search for solution ways.

In philosophical literature, responsibility is seen as a category of ethics, which reflects “the special social and moral attitude of a person to society, humanity as a whole, characterized by the fulfillment of moral duty and legal norms. Responsibility as a category covers the philosophical and sociological problem of correlation of human capacity and ability, acting as the subject (author) of one’s actions, as well as more specific issues: the ability of a person to consciously (deliberately, voluntarily) fulfill certain requirements and carry out those tasks that confront one; to make the right moral choice; to achieve a specific result, as well as the related

issues of the right or guilt of a person, the possibility of approving or condemning his actions, encouraging or punishing one.”¹

It can be stated that in the philosophical dimension in general, the concept of “responsibility” is understood as the internal freedom of human, as one of the elements of the social structure that determines the degree of freedom and the main direction of human behavior.²

Such concept of responsibility, first and foremost as a social phenomenon, is important in view of the current state of social development, in particular the formation and development of civil society.

Although the problem of civil society has long historical roots, its research has been carried out both at the political, philosophical and legal levels since the seventeenth century, but so far there are debates on both the understanding of civil society itself and its institutional structure, its content filling, mechanisms of functioning.

The idea of civil society is the idea of human development from the imperfect to the more developed and civilized,

¹ Див. Философский словарь. – М., 1981 – С. 267.

² Див. Відповідальність у праві: філософія. Історія. Теорія. За заг. ред. І. Безклубого. Київ, «Грамота». 2014. – С. 105.

the society – from the despotic to the democratic one; it is the idea of a human becoming a person, a “citizen of society”. It is still the idea of personal freedom – its autonomy, inviolability of the personal sphere, private property – in the concept of civil society it acts as the main parameter that determines (“programming”) the quality of the internal policy of the state, state legal activity.¹

One of the most difficult problems in ensuring the sustainable social development is determining the ratio between civil society and the state, their interaction, effective functioning.

Civil society, as a certain qualitative condition of the community of people in a state, which is formed under conditions that develop naturally, evolutionarily and develop under the influence of the individual’s desire for free self-realization in society and the state, self-regulation without the intervention of the state or with its minimal participation, has the prospect of steady development only in conditions that the state is able to guarantee the fundamental rights and freedoms of man and citizen, guarantee the inviolability of private property, equality of citizens.

The principle of egalitarianism, which is on the core in civil society, determines the balance of the role of the state and civil society subjects in the realization of their tasks and interests.

One of the main factors affecting the quality of public relations in civil society is the understanding by each member of society of self-worth, personal self-real-

ization, and their own freedom, which is based on natural inalienable rights.²

At the same time, the institute of responsibility for such conditions acts as an important instrument of ordering social relations and manifests itself in various forms: social, political, economic, legal.

Taking into account the leading role of law as a priority regulator in civil society, legal (judicial) responsibility plays an important role in the system of related categories.

Determining the main methodological approaches to the analysis of legal liability, we can not disagree with the point of view of D. I. Bronstein that the development of the category of legal responsibility should first and foremost be firmly focused on the achievements of philosophical science, to use them as a general theoretical basis while developing particular legal problems.³

At the same time, basing on general principles which are the features of social responsibility in general, legal responsibility is an important legal institution, an effective component of the mechanism of legal regulation, and therefore it is characterized by a specific legal nature, special patterns of its emergence, functioning and development as a certain legal phenomenon.

Thus, the study of problematic issues of legal (including civil law) responsibility requires consideration of both its gen-

¹ Див. Юридическая ответственность. ЮНИТИ (UNITI), Москва, 2012. С. 27.

² Див. Юридическая ответственность, с. 28

³ Див. Бронштейн И. В. Правовая ответственность как вид социальной ответственности и пути ее обеспечения. Ташкент, 1989. С. 21.

eral features inherent to social responsibility at the stage of civil society formation in Ukraine and activation of integration processes which are the features of the modern period, as well as the peculiarities caused by the specific nature of legal instruments to which it belongs.

In addition, highlighting the features of legal responsibility as a generic legal category, it is important to pay attention to its applied aspects, which are reflected in the sectoral features.

In view of the above, civil law liability as a legal phenomenon and legal category has been and remains the object of numerous scientific researches of both domestic and foreign jurists.

The main provisions on the concept of civil law liability, its legal nature, characteristic features and scope, as well as ratio with other civil law constructions were formed in the civilistic doctrine of the Soviet period in the papers of prominent civilians: M. M. Agarkov, S. S. Alekseev, B. S. Antimonov, S. M. Bratus, P. Varul, O. S. Ioffe, O. O. Krasavchikov, M. S. Malein, V. A. Oihenzicht, A. O. Sobchak, V. T. Smirnov, K. A. Fleischitz and many others.

Significant contribution to the development of the civil law liability was made by one of the founders of the Ukrainian civil school G. K. Matveev, who substantiated the doctrine of the composition of a civil offense as a necessary and sufficient basis for civil liability.¹

¹ Про це більш докладно див. Кузнєцова Н. С. Інститут цивільно-правової відповідальності у цивілістичній доктрині України//5 т. Т.3: Доктрина приватного права України. – Х.: Право, 2013. – с. 330–332.

With the adoption and entry into force of the Civil Code of Ukraine in 2003–2004, a new stage in studying of civil liability issues began.

One of the first attempts in the national civilistic literature to substantiate the theoretical foundations of civil law liability was the monograph I. S. Kanzafor “Theory of Civil Law Liability” (2006).

Analyzing the general methodological approaches which are used in research devoted to the scientific activity as a whole, the author rightly states that “modern lawyers, studying civil liability problems, have the opportunity to use the all the arsenal of scientific cognition, from philosophical approaches to special methods, but unfortunately they don’t always do it”.²

Fully supporting the idea by I. S. Kanzaforova that the place and role of civil liability, its importance for the further improvement of both the whole mechanism of civil law regulation and its individual components should encourage researchers of this (without exaggerating) legal phenomenon, to carry out its integrated, comprehensive and systematic analysis, as well as (and maybe first of all!) from the general methodological positions, which are offered in modern philosophical and legal literature, we should note that such a substantive analysis is actually absent in the mentioned work. The author is limited only by the abstract review of definitions of scientific activity, levels of scientific cogni-

² Канзафарова І. С. Теорія цивільно-правової відповідальності. Одеса, «Астропринт». 2006.-с. 18.

tion, science as a system of knowledge, proposed in the works of philosophers and sociologists, and concludes that review with the general conclusion that “consideration of the science of civil law from different angles of view allows to make a clear idea of the meaning of the term “civil law liability theory...”¹

However, it remains unclear and uncertain what the author puts into this concept, as in others used in the monographic research: “logical structure of the theory of civil law liability”, “methodological tools of the theory of civil law liability” and so on.

At the same time, despite the critical attitude to the certain conclusions and positions by I. S. Kanzafarova, we can quite positively evaluate the very attempt to solve an extremely difficult problem: on the one hand, to find out, through the prism of universal philosophical views, the main categories that characterize the institution of civil law liability (concepts, features, conditions (grounds), functions, principles, etc.), on the other – to form a coherent systemic consideration of civil liability in the light of current realities and, as a result, to define and substantiate the concept of civil law liability in the civil law of Ukraine.

It seems that the solution of such a scientific problem requires consolidation of research efforts, in particular, for a thorough analysis of the concept itself, the content, the importance of this important institution, its place in the system of civilistic tools.

¹ Канзафарова І. С. Теорія цивільно-правової відповідальності. Одеса, «Астропринт». 2006.-с. 17, 63, 71.

It should be noted that civil law liability is still considered only in terms of clarifying its individual aspects.

In particular, we should admit the works by V. D. Prymak, who conducted a fairly detailed analysis of the civil law liability of legal entities and in this context, stopped at finding out the essence of civil law liability, studying it both “from the point of view of establishing a fair balance of interests of participants of the relevant legal relationship, and from view of the key characteristics of the influence on the private interests of certain categories of civil law subjects or full party of civil law liability relations, and taking into account the public interest in securing the observance of legality in the sphere of civil law and while creating conditions for sustainable development of civilian circulation.”²

Relying primarily on the researches by Soviet-era civilians, the author substantiated the conclusion that “civil law liability is the legal result of a civil offense, and therefore a violation of another person’s subjective civil law (which is the legal and factual basis of civil law liability) the responsible person, in the case of presence of the conditions stipulated by law or by the contract, has the obligation to suffer adverse financial consequences for one in order to provide recovery (compensation) to the creditor.”³ Thus, the author, taking into account the purpose of measures of civil law liability and its connection with the violated regu-

² Примак В. Д. Цивільно-правова відповідальність юридичних осіб. Київ. «Юрінком Інтер», 2007. – с. 21.

³ Примак В. Д. Вказ. праця. – с. 63.

latory relations, considers the existing compensatory property obligation of the debtor in protective civil relations for compensation of losses caused to the injured party as a result of violation of one's subjective civil law as a legal form of existence of civil law liability.¹

Agreeing with the conclusions by V. D. Prymak in general, regarding the general principles of civil liability, we note that they play in the mentioned paper a "supporting" role, since the author's main attention is precisely paid to the peculiarities of liability of legal entities in civil law. It is quite natural that the author did not set the task of a deep analysis of the main methodological problems of civil liability, including taking into account its general philosophical aspects.

One of these general theoretical problems is the justification of the conditions (grounds) for civil law liability. As it was already mentioned, in the 60's of the last century G. K. Matveev systematically formulated the doctrine of the composition of civil offenses as a necessary and sufficient basis of civil law liability², which for almost forty

years was not in doubt and civilians' discussions were focused mainly on the identification and analysis of certain elements of the composition. Yes, Yu. H. Kalmykov rightly noted that in the legal literature there is no doubt that the definition of clear boundaries of the comparative concept of the composition of civil offense is of great practical and theoretical importance. The question remains on the composition itself, on the elements that should be included in the composition or left outside, on the content of categories such as illegality, causation, guilt.³

The concept of offense as the basis for responsibility in the 70–80 years of the last century was also accepted by the general theory of law. I. S. Samoshchenko in his paper "Concept of offense in Soviet law" conducted a detailed analysis of the category of offense and concluded that although certain crimes, civil, administrative or other offenses differ from each other by the content of the actions from which they consist, by the nature of social connections in which they occur and affect, the degree of public harm, etc., however, all crimes, civil violations, administrative offenses, etc., have common features. On the one hand, they are united by their internal unity, on another – all of them have external (descriptive) features that characterize them as a special phenomenon – offense as a whole.⁴

¹ Примак В. Д. Вказ. праця – с. 63.

² Див. Матвеев Г. К. Вина в советском гражданском праве [Текст] / Г. К. Матвеев. – Киев, 1955. – С. 306; Г. К. Матвеев. К вопросу о вине как основании договорной ответственности [Текст] / Г. К. Матвеев // Науч. зап. КГУ. – 1948. – Т. 7. – Вып. 2. – С. 111–137; Г. К. Матвеев. О вине как основании гражданско-правовой ответственности по советскому праву [Текст] / Г. К. Матвеев // Науч. зап. КГУ. – 1952. – Т. 11. – Вып. 3. – С. 87–116; Г. К. Матвеев. Основания гражданско-правовой ответственности советских юридических лиц [Текст] / Г. К. Матвеев // Науч. зап. КГУ. – 1953. – Т. 12. – Вып. 1. – С. 15–43; Г. К. Матвеев. Основания гражданско-правовой [Текст] / Г. К. Матвеев. – М., 1970. – С. 310/

³ Див. Калмыков Ю. Х. Об элементах состава гражданского правонарушения // в кн. Калмыков Ю. Х. Избранное. Труды. Статьи. Выступления. М., 1998. С. 11.

⁴ Див. Самошенко И. С. Понятие правонарушения по советскому праву. М., 1963. С. 7.

The set of these features of objective and subjective order is considered as an offense composition, which serves as a basis of responsibility.

However, in the literature there are other interpretations of grounds of responsibility, in particular, civil law one. Without mentioning the category of the offense composition, some authors recognize as the grounds of liability (or its conditions) unlawful conduct, harm caused, a causal link between them and the guilt of the offender. However, it is nothing more than detailing one and the only ground of offense (civil, disciplinary, etc.).¹

At the same time, attempts were made to interpret the composition of the offense in another way. Thus, S. S. Alekseev tried to justify the proposition that the composition of a civil offense is a set of three elements: the object, the subject and the objective side. In this case, the offender's guilt was removed from the composition framework. The peculiarity of civil law regulation of relations related to property offenses shows, according to S. S. Alekseev, that it would be more correct, logical to go the other way and, abandoning the analogy with criminal law, to attribute the guilt not to the offense composition but, considering it in the negative aspect, as innocence – to the grounds of discharge.²

However, it should be noted that this construction was not accepted by the

civil law community. As for the exclusion of guilt from the civil offense composition, so S. S. Alekseev in his subsequent studies did not so consistently uphold that position.³

Analyzing the above point of view, we should admit the attempt to look at the offenses in view of the general approaches used in the study of the legal relations structure, and to some extent unjustifiably approximate these categories.

The doctrine of the composition of civil offenses as a basis of civil law liability has become almost textbook character and is included in all civil law textbooks.

However, in a fundamental study on the problems of contract law, V. V. Vitransky not only questioned such a doctrine, but also severely criticized it, noting that its authors and adherents bring to civil law teachings which are not inherent, alien to it.

According to V. V. Vitransky, the ground of civil law liability (one and only common) is the violation of subjective civil rights, both property and personal non-property, since civil liability is the responsibility of one participant of property circulation to another, the liability of the offender to the victim, its the overall purpose is to restore the violated right on the basis of the principle of conformity for the amount of loss or damage caused.

During the application of civil liability, there are no legal sense of “harmful consequences” in terms of the negative impact of the violation of civil rights on

¹ Див. Самощенко И. С., Фарукшин М. Х. Ответственность по советскому законодательству. М., 1971.

² Див. Алексеев С. С. О составе гражданского правонарушения//Правоведение. – 1958. – № 1. С. 51.

³ Див. Алексеев С. С. Общая теория социалистического права. Вып. 2, М., 1964. С. 225.

the public interest (among other things, as well as the public interest itself), “objective” and “subjective” parties civil offense.

Thus, the violation of the subject’s right of civil relationship causes the need to restore the violated right, including through the application of civil law liability. Hence, the ground for such liability is the violation of the subjective civil right.

In order to certain types of violated subjective civil rights, as well as the subjects who have committed such violations, the legislator has formulated mandatory general requirements, the observance of which is necessary for the application of civil law liability. These set by the law requirements are the conditions of civil law liability. These include: unlawful violation of subjective civil rights; the presence of loss (damages), a causal link between the violation of subjective civil rights and loss (damages), the guilt of the offender¹.

This position requires careful and deep analysis, which can and perhaps should be the matter of separate study.

If we reject the categorically emotional tone, which outlines the absolute rejection of the doctrine of the composition of civil offense as a ground of civil law liability, and give a general assessment of the alternative proposed to this doctrine, it can be established that V.V. Vitransky tries to separate the conditions of civil liability (from the one and only ground of liability), which he un-

derstands as the general requirements, compliance with which is necessary for the application of civil law liability. He considers such a ground to be the violation of subjective civil rights (both property and personal).

But does this vision of the grounds and conditions of liability differ fundamentally from the composition of the civil offense and its elements: unlawful conduct, damage caused, a causal link between them and the guilt of the offender? It is unlikely that you can answer that question in the affirmative.

It should be noted, that such keen criticism has not yet changed the overall assessment of the doctrine of the composition of the civil offense, which is still at the forefront of all textbooks².

In the conditions of the rule of law and the formation of civil society, not only the role of law as an important regulator of social relations, a certain social phenomenon, but also the content of the main legal categories and legal means is changing qualitatively. There is no doubt that it also applies to the institute of responsibility too.

In contrast to retrospective liability (that is, liability for a civil offense committed), positive liability means the obligation to comply with regulations, legal norms requirements (obligation to act lawfully, the requirement to comply with legal norms)³.

² Див. Гражданское право. В 4-х томах. Отв. редактор – д.ю.н., проф. Е. А. Суханов. Том 1. Общая часть. М., 2006. С. 597–598.

³ Див. Хачатуров Р.Л., Липинский Д. А. Общая теория юридической ответственности. С. 133.

¹ Див. Брагинский М. И. Витрянский В. В. Договорное право. Общие положения. М., 1997. С. 569–570.

In civil law, this position was supported by V.A. Tarkhov, who believed that “legal liability is an obligation regulated by law to report in one’s actions ... The requirement of a report is the main feature and the essence of responsibility, and whether a conviction and punishment comes after the report is another matter”¹.

If we look more broadly at the concept of positive responsibility in view of the legal and moral grounds of the formation and functioning of civil society, the central place in which is human as the owner, the creator, the personality – occupies; a society whose primary purpose is determined as the guarantees for the realization and protection of the fundamental rights of citizens, we can agree that this approach no longer causes the kind of rejection that took place during the totalitarian Soviet era.

Such understanding of positive (prospective responsibility) is closely linked to the civil liability of its preventive-educational function. If we are talking about the means of legal influence, the main component of which is the mechanism of legal regulation, it is certainly necessary to include in this process such important factors of legal influence as legal awareness, legal culture, legal education. All these legal instruments and categories are organically linked and inherently determine a broader understanding of the concept of legal (includ-

ing civil law) liability, the combination of its positive and retrospective aspects, which may also ensure the prevention of civil offenses, and in the case of their commission – to provide restoration and protection of violated civil rights. In such a context, the responsibility can be seen as a significant factor aimed at stimulating, first of all, the legitimate and responsible (conscious) behavior of society members.

At the same time, the concept of “two aspects legal responsibility” has caused quite harsh criticism among representatives of the general theory of law. In particular, M. I. Kozyubra notes that “excessive grasping of different logical constructs, as well as the terminological “dressing” of legal responsibility into concepts and categories from other sciences, leads to the fact that theoretical studies of legal responsibility actually move in a closed circle; there is almost no increase of new knowledge in its understanding. Such studies distract from the analysis of legal responsibility in the context of modern European and civilizational values, relevant international legal obligations of Ukraine, in connection with domestic and foreign court practice, in particular the case law of the European Court of Human Rights”.²

We should not disagree with such a worrying assessment of the state of general theoretical studies of legal liability problems, which can be attributed with-

¹ Див. Тархов В. А. Ответственность по советскому гражданскому праву. Саратов, 1973. С. 4, 11. Див. також: Тархов В. А. Гражданские права и ответственность. Уфа, 1996. С. 64–81.

² Відповідальність у праві: філософія. Історія. Теорія (р. 2.1. Стан розробки загально-теоретичних досліджень юридичної відповідальності в Україні). Київ. «Грамота». – 2014.-С.2014.-С. 345.

out reservation to sectoral researches, at least to civilistic studies, as it was already noted.

Despite its theoretical and practical importance, there is still a lack of fundamental scientific researches on the issues of both grounds for civil liability and the exemption from it, certain conditions of liability, including the guilt of the offender, which has significant differences in civil law.

In modern conditions, the issue of taking into account force majeure in connection with contractual obligations violation becomes more relevant.

Although the legislator does not use the term “force majeure” neither in the Commercial Code of Ukraine nor in the Civil Code of Ukraine, in contractual practice, especially in the sphere of foreign economic relations, it is widely used.

In modern civilistics, there is virtually no fundamental research of the category of “irresistible force”, at the same time a reference to the presence of “force majeure” in practical law enforcement in connection with events related to illegal annexation of Crimea, as well as military actions in the east of Ukraine, significantly updates this issue, taking it beyond the framework of foreign economic relations only.¹

It seems that problems of correlation of such important categories as “civil liability”, “protection of civil rights”,

“subjective civil rights abuse” have not yet been fully studied in the private legal doctrine, especially from the point of view of deep analysis of recent case law, which is being formed by the Supreme Court.

Considering civil liability as an important legal construction, an effective legal mechanism, we should not forget its practical component – it should be an effective element of the mechanism of legal regulation.

It is still this vision of the mission of civil liability which made the developers of the Civil Code of Ukraine to identify the need to include in the Civil Code of Ukraine in 2003, a separate chapter 51 “Legal consequences of obligations violation. Liability for obligation violation”. In Art. Art. 610–625 of the Civil Code of Ukraine, which are included in the mentioned chapter, were fixed the basic approaches, worked out by the civilistic doctrine concerning the institute of civil law responsibility.

It should be noted that in this context, the understanding of liability is “narrowed down” solely to the extent of the obligation legal relations.

At the present stage, we are studying the institution of civil law liability much more widely, realizing that the violation of any right (not just that which arose in the field of obligations violation) should cause civil law liability.

At the same time, traditionally the most complete essence, the legal nature, the appointment of responsibility is revealed in obligation relations.

During the 15 years that the Civil Code of Ukraine has been in force, both

¹ Див. Кузнєцова Н. С. Форс-мажорні обставини як підстава звільнення від цивільно-правової відповідальності//Матвєєвські читання: звільнення від цивільно-правової відповідальності у сучасних умовах. Біла Церква. 2015.-С.5–9.

internal and external changes have taken place. Appropriate practice has emerged that has identified “bottlenecks” in the legal regulation of relations that arise in the application of civil liability measures. As before, the problems of responsibility are under the scrutiny of researchers, and their works bear new ideas that, to some extent, enrich the civilist doctrine.

Globalization processes make legal practitioners to actively work in the field of harmonization of fundamental approaches to the regulation of social relations, including (and in some cases, first and foremost) private legal ones.

If at the end of the last century – at the beginning of the present century, these processes were only an idea and were just beginning, today the legal community has high-quality guidance documents, such as the Principles of European Contract Law (PECL); Principles of international commercial agreements of UNIDROIT (Principles of UNIDROIT); Aquis Principles (ACQP); Draft Common Frame of Reference (DCFR) and others.

Certainly, in the process of updating the civil legislation of Ukraine (the “recodification” of civil law), which we have to some extent “postponed” in connection with the large-scale court reform in Ukraine, the provisions of the mentioned recommendation acts should be taken into account as much as possible, because they are the product of the generation of modern world private law thought.

We have obtained in these documents a highly concentrated result of compara-

tive legal analysis not only of different legal systems, but also of legal mechanisms inherent to different legal families, in particular systems of continental private law and Common Law.

Conducting this analysis, it is hoped that in today’s context these legal families, while maintaining common traditions, have nevertheless become closer together, and such a process is objectively conditioned.

We can agree that the recommended acts of harmonization of European law (PECL, DCFR and others) are the product of pan-European civilistic thought, which is why they provide for the regulation of relevant social relations, as much as possible, free from “national” dependence. In addition, they give an insight into modern civil law, free from the conjuncture.¹

Many countries of the former USSR, which adopted national civil codes in the late XX and early XX centuries, are in the process of civil law renewing. The Civil Code of the Republic of Moldova has been recently amended. The experience of our Moldovan colleagues may be particularly interesting and useful to us, since the preparation of the changes to the Civil Code has been focused on European approaches as much as possible.

Taking into account these factors, it is important to consider the problem of improving the rules governing civil law liability precisely from the standpoint of modern European approaches, primarily

¹ Модельные правила Европейского частного права. Предисловие. М., Статут, 2013. с. 5–6.

enshrined in the DCFR.

In particular, Book III of the DCFR “Obligations and corresponding rights” contains Chapter 3 “Remedies for non-performance”, which includes both the general provisions and the specific regulations relating to particular conflict situations.

While analyzing the content of certain DCFR articles, some general caveats are needed. As a result of the comparative analysis and usage of private-law sources belonging to different legal systems, this act has its own legal ideology, which differs substantially from the traditional civilistic mentality that is familiar to us, traditional for the Ukrainian (and generally post-Soviet).

Firstly, the high degree of detail of the certain provisions.

Secondly, paying significant attention to “legal technology”.

Thirdly, there is a certain fragmentation that is reflected in the identification and detailing of some aspects (perhaps more precisely – of certain legal situations).

Thus, it is possible to note certain features in the content of the DCFR, but they are completely “fit” in the nature of this document: “Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)”. Considering this document as one of the pan-European standards of private law, “fitting” it to our Ukrainian legal realities, it is expedient to determine what DCFR provisions, in particular in the area of civil liability regulation, can be used while the recoding of the Civil Code of Ukraine.

It should be noted that, while considering the issue of improvement of the institution of civil liability, it should be taken into account that certain **general provisions** are contained in Chapter 3 of the Civil Code of Ukraine “Protection of Civil Rights and Interests”, in particular, Art. 22 and 23. In such conditions, it is advisable to analyze the rules of Section III (Chapter 3) of the DCFR “General Provisions” on non-performance protection measures, in particular Art. Art. **3: 101** “Available protection measures”; **3: 102** “Combining protection measures” and 3: 104 “Exemption from liability on obstacle”; **3: 105** “Conditions which exclude or limit protection measures”.

The content of Art. **3: 105** is very close to Part 3 of Art. 614 of the Civil Code of Ukraine, at the same time the stated DCFR norm is more detailed, which will allow to apply it more effectively in practice.

Interesting in terms of possible implementation is DCFR’s Section 7 (Chapter 3) “Losses and percentage”, which requirements are predominantly focused on the legal consequences of obligation violations.

Thus, **Art. 3: 701** defines general approaches to determining the right to compensation for damages. In particular, it is assumed that the creditor is entitled to compensation for losses caused by the debtor’s non-performance in all cases, except in those cases where liability for non-performance does not arise. Thus, based on the content of the mentioned norm, it is possible to qualify the compensation of damages as a form of liability.

Art. 3: 702, which deals with the total amount of damages compensation, corresponds with the approaches mentioned in the Civil Code of Ukraine.

Thus, the total amount of damages compensation caused by non-performance of an obligation is the amount sufficient to allow the creditor to be as far as possible in the position (condition) in which he or she was in the case of properly performing the obligation.

Such compensation shall cover the damage suffered by the creditor as well as the benefit which he has been deprived of. Interesting is **Art. 3: 703** “foreseeability”, which states that the debtor for a liability arising out of a contract or other legal act is liable only for the damage which he has foreseen or can reasonably be assumed to have foreseen at the time the obligation arose, as a probable result of its non-performance, except where the obligation was violated intentionally and also due to the debtor’s negligence or gross negligence.

It should be noted that the issue of foreseeable losses is also governed by the Vienna Convention on Contracts for the International Sale of Goods.

Recent decisions by the Grand Chamber of the Supreme Court (May 2018) have again paid attention to the application of Art. 625 of the Civil Code of Ukraine and intensified the discussion on liability for monetary obligations violation.

Not dwelling in detail on the content of this ruling of the Supreme Court of 18 May 2018, we note that the wording of **Art. 3: 708** DCFR “Percentage on late

payment” can be very useful in further improvement of Art. 625 of the Civil Code of Ukraine, concerning the payment of interest for **monetary obligations violation**. DCFR, by waiving the designation of a “monetary obligation”, provides that in the event of late payment of money, regardless of whether the debtor is responsible for non-performing, the creditor is entitled to claim interest on this amount, starting from the date of payment and until the payment is made at the prevailing rate of short-term loans provided by commercial banks to borrowers in the currency used as the means of payment at the place where it should be done.

While doing it, the creditor may recover other damages. **Art. 3: 709** resolves the issue on percent capitalization by stating that percents which should be paid in favor of the creditor, also should be added to the unpaid main amount of the debt every 12 months.

In our opinion, the mentioned DCFR provisions (as well as many other obligations related to the regulation of obligation relations) can be effectively used while discussing ways of improvement the requirements of the Fifth book of the Civil Code of Ukraine “Law of obligations”.

They are the result of the fundamental work of highly professional private law professionals of European countries and take into account the most significant trends in the development of modern private law in different legal systems of Europe.

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